IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2007

CORAM:

THE HONOURABLE MR.JUSTICE K. MOHAN RAM

Crl.O.P.No.18129 of 2007

and

M.P.Nos. 1 & 3 of 2007

M/s.S.Raja Saravanan
S/o S.Devarajan,
No.19, 5th Cross Street,
Krishna Nagar,
Pondicherry - 605 008. .. Petitioner

-Vs.-

K.Anandarajan,
S/o Kathavarayan,
Plot No.127, 3rd Cross Street,
Kandaswamy Nagar,
Palavakkam Village,
Chennai - 600 041. .. Respondent

Prayer: Petition filed under Section 482 of the Code of Criminal Procedure to call for the records relating to the C.C.No.1146 of 2007 pending on the file of Judicial Magistrate -II, Pondicherry and to quash the same in so far as Petitioner / Accused 1 is concerned.

For Petitioner : Mr. S.Sundaresan
For Respondent : Mr. N.Suresh

O R D E R

The petitioner who is the sole accused in C.C.No.1146 of 2007 on the file of the Judicial Magistrate - II, Pondicherry is facing trial for the offence under Section 138 of the Negotiable Instrument Act (herein after referred to as 'the Act') and has filed the above petition seeking quashing of further proceedings in C.C.No.1146 of 2007.

2. It is alleged in the complaint that the accused borrowed a sum of Rs.2,00,000/- from the complainant for his business purpose; the accused has given a cheque bearing No.249039 dated 26.08.2005 for Rs.2,00,000/- drawn on UCO bank, Bazar Branch, Pondicherry; when the cheque was presented for collection, the same was returned unpaid; in the cheque

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returning memo dated 01.10.2005, the reason for return of the cheque is mentioned as "insufficient funds"; Notice for demand dated 14.10.2005 was sent to the petitioner which had been received on 18.10.2005 by somebody on his behalf; neither any reply was sent nor the cheque amount was paid. Hence a complaint was filed on 2.11.2005.

3.The petitioner is seeking to quash the proceedings on the following grounds viz.,

(1) The petitioner has not received money from the complainant / respondent nor aware of him.

(2) The petitioner has not received any money nor issued any cheque in favour of the respondent.

(3) The petitioner is not a partner on the date of alleged commission of offence and on the date it was only a proprietorship.

(4) The petitioner has not received any notice from the respondent.

(5) The respondent did not sent any notice to firm (or) its partners who alleged to have borrowed the money as mandate U/s 141 of the Act.

(6) As per the averments found in the notice, the notice was received by the firm through somebody at the firm's address on 18.10.2005 and they have not given 15 days time as mandated under the provisions of Negotiable Instruments Act and filed the complaint on 02.11.2005 the 15th day and thus the complaint fails for not following the statutory provisions.

(7) The petitioner is not holding any account and the cheque was not issued to respondent and the Name of respondent had been filled up by using an undated cheque signed by the petitioner in his capacity as partner.

(8) Admittedly the firm has not been arrayed as accused and the petitioner alone should not have been arrayed as accused.

(9) The notice sent to the petitioner as partner of the firm is not sufficient.

4. Heard Mr.S.Sundaresan learned counsel appearing for the petitioner and Mr.N.Suresh learned counsel appearing for the respondent.

5. Mr.S.Sundaresan, learned counsel appearing for the petitioner reiterated the above said contentions raised in the quash petition and in support of the above said contention, he relied upon the following decisions reported in:

(1) 2006 (4) CTC 529 (B.Raman and others Vs. Shusun Chemicals and Drugs Ltd.,).

(2) 2007 (1) CTC 291 (Lakshmi Srinivas Saving & Chit Funds Syndicate Pvt. Ltd, rep. by its present Foreman, N.Sathiyam Vs. S.Bhojarajan).

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(3) 2007 (1) CTC 529 (SC) (Saroj Kumar Poddar Vs. State (NCT of Delhi) and another)

6. In 2006 (4) CTC 529 (B.Raman and others Vs. Shusun Chemicals and Drugs Ltd.,) in paragraph 13 the Division Bench has observed as follows:-

> "13. A reading of Sections 138 and 142 would make it clear that the Complainant or payee can approach the Court to make a Complaint against drawer only when the drawer fails make the payment, after receipt of statutory notice, within fifteen days. That means, the cause of action would arise only when the drawer, who received statutory notice, fails to comply with the demand, through notice sent by the payee, within fifteen days of the receipt of notice. Only thereafter, the complainant can approach the Court within one month of the date on which the said cause of action arises i.e., the complainant can report to the court about the cause of action that an opportunity has been given to the drawer and, despite that, the drawer has failed to make payment within fifteen days of the receipt of notice and, as such, he is liable to be punished....."

basing reliance on the above said observation, the learned counsel submitted that since the notice is said to have been received by the petitioner on 18.10.2005 and the complaint has been filed on 02.11.2005 i.e. on the 15th day the cause of action had not arisen as on 02.11.2005 and as such cognisance ought not to have been taken on the complaint and on that ground the proceedings is liable to be quashed.

7. In 2007 (1) CTC 291 (Lakshmi Srinivas Saving & Chit Funds Syndicate Pvt. Ltd, rep. by its present Foreman, N.Sathiyam Vs. S.Bhojarajan), the contention as put forth by the accused in that case is that the cheque was issued only in favour of M/s.Srinivas Chit Funds Private Ltd." whereas the name of the complainant company is "M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Ltd." The complaint was filed by the complainant, whereas the name of the complainant company was M/s.Lakshmi Srinivas Savings and Chit Funds Syndicate Private Ltd.", the notice was also issued by the 'M/s. Lakshmi Srinivas Savings and Chit Funds Private Ltd.," whereas the cheque was issued only in favour of M/s. Srinivas Chit Funds Private Ltd." Hence the learned Judge held that only the payee is competent to issue any notice demanding the accused to call for settling the dues towards the dishonoured cheque and ultimately held that the complaint filed by the complainant was not maintainable. Basing reliance on the above said decision, the learned counsel for the petitioner submitted that since in this case notice of demand has been issued only to the petitioner and not to the firm which is the drawer of the cheque the notice is invalid. The learned counsel further submitted that the notice had not been personally served on the petitioner and therefore no cause of action had arisen for filing a complaint.

8. In the decision reported in 2007 (1) CTC 529 (SC) (Saroj Kumar Poddar Vs. State (NCT of Delhi) and another) in paragraph 17 the Hon'ble Apex Court has observed as follows:-

> "17. ..... Section 141 raises a legal fiction. By reason

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> of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the Complaint Petition, are made so as to make the accused therein vicariously liable for the offence committed by the Company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted....."

basing reliance on the above said contention, the learned counsel for the petitioner submitted that the requisite statements which are required to be made in the complaint have not been made more particularly without any averment that the petitioner was in charge of and responsible for the conduct of the business of the firm the complaint against the petitioner should not have been taken cognisance of.

9. The learned counsel for the petitioner further submitted that the firm M/s. Smart & Co was a registered partnership firm and the same was dissolved in October 2004 and the notice of dissolution of the firm was given on 01.10.204 in Form No.5 to the Registrar of Firms as contemplated under Section 63(1) of the Indian Partnership Act, 1932 and the same had been entered in the Register on 04.10.2004. Whereas the cheque in question is dated as 26.08.2005 which will show that the cheque had been misused by the complainant.

10. Countering the said submissions, the learned counsel for the respondent submitted that though in the cause title the accused has been described as S.Raja Saravanan, S/o. S.Devarajan, in the long cause title the accused has been described as Partner of M/s.Smart & Co., having address at No.132, Anna Salai, Pondicherry – 605 001. The notice sent to the partner of the firm will amount to notice to the firm and as such the notice sent to the partner is a valid notice and necessary cause of action has arisen in filing the complaint. In the complaint it has been specifically avered that a sum of Rs.2,00,000/- was borrowed for his business purposes and the petitioner is the signatory to the cheque and as such even if the firm has not been arrayed as accused, complaint filed against the petitioner is valid.

11. The learned counsel further submitted that even assuming that the complaint was filed on the 15th day i.e. even before the cause of action had arisen on that ground the complaint could not be rejected because admittedly within the stipulated period of 15 days from the date of receipt of notice of demand, the petitioner had not complied with the demand and as such on 03.11.2005 the cause of action for filing the complaint has arisen.

12. The learned counsel further submitted that even assuming that the firm had been dissolved and notice of dissolution as contemplated under Section 63 (1) of the Indian Partnership Act has been given to the

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Registrar of Firms and the same had been entered in the Register it is not sufficient as no public notice regarding dissolution of firm has been given as contemplated under Section 45 of the Indian Partnership Act.

13. The learned counsel further submitted that the mode of giving notice under Section 45 of the Act has been provided for under Section 72 of the Partnership Act and such a procedure has not been followed and as such a partner continues to be liable as partner to third parties for any act done by any of them which would have been an act of the firm if done before dissolution.

14. In support of the above said contention, the learned counsel appearing for the respondent relied upon the following decisions viz.,

(1) AIR 2001 SC 518 (Rajneesh Aggarwal Vs. Amit J.Bhalla)

(2) AIR 2005 SC 3512 (S.M.S.Pharmaceuticals Ltd., Vs. Neeta Bhalla and another)

(3) CDJ 2004 MHC 972 (V.Sundaram Vs. E.Santhalingam)

(4) 2007 (3) CTC 356 (B.Narashimha Rao Vs. T.Raghavalu Naidu & Co,)

(5) CDJ 2007 MHC 1847 (N.R.Mahesh Vs. N.Ashok)

15. In the decision reported in AIR 2001 SC 518 (Rajneesh Aggarwal Vs. Amit J.Bhalla) in paragraph 6 the Hon'ble Apex Court has observed as follows:

> "6. .....The appellant had issued notice to said Shri Amit J.Bhalla, Director of M/s. Bhalla Techtran Industries Ltd. Notwithstanding the service of notice, the amount in question was not paid. The object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques. It is Amit Bhalla, who had signed the cheques as the Director of M/s. Bhalla Techtran Industries Ltd. When the notice was issued to said Shri Amit Bhalla, Director of M/s. Bhalla Techtran Industries Ltd., it was incumbent upon Shri Bhalla, to see that the payments are made within the stipulated period of 15 days. It is not disputed that Shri Bhalla has not signed the cheques, nor is it disputed that Shri Bhalla was not the Director of the company. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter. We really fail to understand as to why the judgment of this Court in Bilakchand Gyanchand Co., (1999) 5 SCC 693 : (1999 AIR SC 2201 : AIR 1999 SC 2182 : 1999 Cri LJ 3498 : 2000 CLC 75), will have no application. In that case also criminal proceedings had been initiated against A.Chinnaswami, who was the Managing Director of the Company and the cheques in question had been signed by him. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court committed error in

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recording a finding that there was no notice to the drawer of the cheque, as required under S.138 of the Negotiable Instruments Act. In our opinion, after the cheques were dishonoured by the bank the payee had served due notice and yet there was failure on the part of the accused to pay the money, who had signed the cheques, as the Director of the Company. The impugned order of the High Court, therefore, is liable to be quashed."

16. In the decision reported in AIR 2005 SC 3512 (S.M.S.Pharmaceuticals Ltd., Vs. Neeta Bhalla and another) from the reference made by the learned two Judge Bench of the Hon'ble Apex Court, the following question among other questions were considered by a larger Bench viz.,

" 1. .....(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

" 20. ...(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

17. In the decision reported in CDJ 2004 MHC 972 (V.Sundaram Vs. E.Santhalingam) it is observed as follows:

"3. ..... From the decisions cited above, it is clear that a partner who has retired from the partnership is bound to give notice in a vernacular newspaper of the locality wherein the principal place of business of the partnership situated and also in the official gazette. Further from the judgments referred to above, it is also clear that notwithstanding the dissolution of the partnership firm, a partnership continues as to third persons who deal with the members thereof as partners until public notice of dissolution is given, even though, as between the partners the firm has been dissolved prior to such notice. In other words, a partnership is presumed to continue as to third persons until public notice of dissolution has been given unless the person dealing with the firm after its

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dissolution had actual knowledge of such dissolution. Section 45 of the Indian Partnership Act says that a partnership continues as to third persons unless the dissolving of the firm is taken to the knowledge of the third persons who deal with the firm."

18. in the decision reported in 2007 (3) CTC 356 (B.Narashimha Rao Vs. T.Raghavalu Naidu & Co,) in paragraph 10 it is observed as follows:

"10. The said provision makes it very clear that in case of retirement or expulsion or dissolution, etc., it should be by notice to the Registrar of Firms under Section 63 of the Act and by publication in the Official Gazette in atleast in one vernacular newspaper circulated in the district where the firm does its business. Thus, the public notice as contemplated under this Section makes it very clear that the above three modes have to be carried out relating to the retirement or expulsion of the partners, etc."

19. In the decision reported in CDJ 2007 MHC 1847 (N.R.Mahesh Vs. N.Ashok) while considering a similar set of facts, the learned Judge has observed as under in paragraph 12 as follows:

"12. Though in the cause title it appears that the petitioner/accused has been prosecuted as if in his personal capacity, while elaborating the details of the petitioner, it has been stated that the petitioner is a partner of the firm. The name of the firm has been omitted in the cause title. The cheque in question has been issued only by the petitioner in the name of the partnership firm, mentioned in the complaint. Issuance of notice by the respondent/complainant to the petitioner is not in dispute. For the notice issued, no reply has been sent by the petitioner."

and after referring to several decisions has ultimately held in paragraph 14 as follows:-

"14. Therefore, in the instant case, though the firm has been omitted to be listed as an accused in the case, the partner of the firm is arrayed as an accused and there are specific allegations and averments against him. Accordingly, I find that there are prima facie materials to proceed against the petitioner in accordance with law. Hence, I do not find any merit in the petition to quash the proceedings. The petition is dismissed....."

20. I have carefully considered the above said submissions made by the learned counsel on either side and also the decisions relied upon by them.

21. As laid down by the learned Division Bench of this Court in 2006 (4) CTC 529 (B.Raman and others Vs. Shusun Chemicals and Drugs Ltd.,) unless the cause of action arise, a complaint under section 138 could not

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be filed and the cause of action arises only after the drawer of the cheque fails to make payment or comply with the demand to pay the amount covered by the returned cheque within the stipulated period of 15 days i.e. 15 days clear notice should be given and only after the expiry of the 15 days time a complaint can be filed. In this case though admittedly a complaint has been filed on the 15th day i.e. on 2.11.2005, before the expiry of the stipulated period, on that ground, a complaint could not be rejected. Since admittedly the petitioner had not complied with the demand even after the expiry of 15 days period and therefore such contention of the petitioner is unsustainable. In the decision reported in (2000) 7 SCC 183 (Narsingh Das Tapadia Vs. Goverdhan Das Partani) the Hon'ble Apex Court has held that mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. In the instant case it is not the contention of the petitioner that the learned Magistrate took cognizance of the complaint filed by the respondent on the 15th day itself. In the light of the above said ratio laid down by the Hon'ble Apex Court the contention of the petitioner is liable to be rejected and accordingly rejected.

22. The decision reported in 2007 (1) CTC 291 (Lakshmi Srinivas Saving & Chit Funds Syndicate Pvt. Ltd, rep. by its present Foreman, N.Sathiyam Vs. S.Bhojarajan) is not applicable to the facts of this case. In that case notice of demand was not issued by the payee and hence the notice was held to be invalid. In this case such a situation has not arisen and the legal notice has been addressed to the following address:

"Raja Saravanan,
S/o Savurirajan,
Partner, Smart & Co.,
132, Anna Salai,
Pondicherry - 605 001."

and as such the facts of that case are totally different from the facts of the case on hand.

23. The decision reported in 2007 (1) CTC 529 (SC) (Saroj Kumar Poddar Vs. State (NCT of Delhi) and another), is not applicable to the facts of this case. Further the requisite statement which is required to be avered in the complaint has been avered in the complaint in this case.

24. Further as laid down in the decision reported in AIR 2005 SC 3512 (S.M.S.Pharmaceuticals Ltd., Vs. Neeta Bhalla and another) so far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141. In this case, admittedly the petitioner is the signatory of the cheque which is dishonoured and therefore the

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contention of the learned counsel appearing for the petitioner that no requisite averment is made in the complaint is liable to be rejected.

25. A close reading of the decision reported in CDJ 2007 MHC 1847 (N.R.Mahesh Vs. N.Ashok) clearly shows that the facts of that case are similar to the facts of the case on hand and the ratio laid down therein squarely apply to the facts of this case. Though in the complaint in this case it appears that the petitioner/accused has been described in his personal capacity but in the long cause title, the petitioner has been shown as a partner of the firm M/s. Smart & Co., the cheque in question had been signed by the petitioner and the same has been issued by the petitioner in the name of the partnership firm.

26. The contention of the learned counsel for the petitioner that since the firm has not been arrayed as an accused, the complaint filed as against the petitioner alone is not maintainable is concerned such a contention is only stated to be rejected. While considering a similar question, the Hon'ble Apex Court in the decision reported in (2001) 10 SCC 91 (R.Rajagopal vs. S.S.Venkat) has held that though the cheque had been issued on behalf of the partnership firm, the complaint filed under Section 138 against the partner in respect of such a cheque without arraying the firm as accused is nonetheless maintainable. Similarly in the decision reported in (2001) 10 SCC 78 (T.Stanes & Co. Ltd. Vs. A.Jaffarullah) the Hon'ble Apex Court while considering the correctness of the decision of the High Court in quashing the complaint on the ground that without joining the partnership firm as the party-respondent, prosecution against the drawer of cheque was not maintainable. By following the decision reported in (2001) 1 SCC 1 (Anil Hada Vs. Indian Acrylic Ltd.,) has held that even if the company is not prosecuted for one or the other reason, the other prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act and in that view of the matter, the impugned order passed by the High Court was set aside. Therefore, in the light of the above said two decisions of the Hon'ble Apex Court, the contention of the petitioner is liable to be rejected. Further as pointed out earlier, the petitioner himself being a signatory of the cheque which has been returned, such a contention put forth by the petitioner cannot be counternanced.

27. In the decision reported in AIR 2001 SC 518 (Rajneesh Aggarwal Vs. Amit J.Bhalla) while considering the question as to whether the notice given to a Director of a Company can be held to be a valid notice as against the company, the Hon'ble Apex Court has held it to be valid. In the said decision the appellant therein had issued notice to Shri.Amit J. Bhalla, Director of M/s. Bhalla Techtran Industries Ltd., and it is Amit Bhalla who had signed the cheque as director of M/s. Bhalla Techtran Industries Ltd., and in that factual background the Hon'ble Apex Court has observed that it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter and held that notice was a valid notice. The said principle of law clearly

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applies to the facts of this case since here the notice of demand has been sent to the petitioner describing him as a partner of M/s. Smart & Co to the correct address and the same has been received by someone on his behalf. Therefore the contention of the learned counsel appearing for the petitioner that there is no valid notice has to be rejected and accordingly rejected.

28. As far as the contention of the learned counsel for the respondent based on Sections 45 and 72 of the Indian Partnership Act and the decisions reported in CDJ 2004 MHC 972 (V.Sundaram Vs. E.Santhalingam) and 2007 (3) CTC 356 (B.Narashimha Rao Vs. T.Raghavalu Naidu & Co,) are concerned, I am of the considered view that the said contention is not applicable to this case. In the context of considering the civil liability of a retiring partner or a partner of a dissolved firm it has been held that in the said decisions that the procedure prescribed under Sections 45, 63 and 72 of the Indian Partnership Act should be complied with. The partnership continues to third parties who deal with the members of the firm as partners until public notice of dissolution is given. Even though as between the partners the firm has been dissolved prior to such notice. But while considering the criminal liability of the retiring partner of the firm or the partner of the dissolved firm under Section 138 of the Negotiable Instruments Act, the main question to be considered is as to whether on the date of issue of cheque and on the date of arising of cause of action such partner was really and actually a partner of the firm or not. Therefore, the said decisions referred to and relied upon by the learned counsel for the respondent cannot be applied to the facts of this case.

29. The contention of the petitioner that the firm had already been dissolved as early as October 2004 and notice of dissolution in Form No.5 had also been given to the Registrar of Firms u/s 63(1) of the Indian Partnership Act and hence the complaint is not maintainable is liable to be rejected as the petitioner happens to be the signatory of the cheque in question.

30. The other contention put forth by the learned counsel appearing for the petitioner that the petitioner has not received any money nor issued any cheque and the cheque was not issued to the respondent and the name of the respondent had been filled up by using an undated cheque signed by the petitioner in his capacity as partner are all issues which have to be raised during the course of trial and proved by adducing acceptable evidence. Since such contention has to be considered on the appreciation of the evidence adduced in the trial the same cannot be considered in this quash petition and for the foregoing reasons the above

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quash petition fails and the same is dismissed. Consequently, the connected M.Ps. are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kk

To
The Judicial Magistrate -II, Pondicherry.

+ 1 CC To Mr. N.Suresh, Advocate SR NO.68824

+ 1 CC To Mr. S.Sundaresan, Advocate SR NO.68493

Crl.O.P.No.18129 of 2007
and M.P.Nos. 1 & 3 of 2007

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